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Nos. 87-1622, 87-1697, and 87-171

IN THE

Supreme Court of the United States

October Term, 1988

PHILIP BRENDALE,
Petitioner,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, et al.,
Respondents.

STANLEY WILKINSON,
Petitioner,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Respondent.

COUNTY OF YAKIMA, et al.,
Petitioners,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE TOWN OF PARKER, ARIZONA

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BRIEF OF AMICUS CURIAE TOWN OF PARKER, ARIZONA

INTEREST OF AMICUS CURIAE

The amicus curiae Town of Parker, an incorporated municipality under Arizona law which is located within the exterior boundaries of the Colorado River Indian Reservation, is a defendant in litigation pending in the United States District Court for the District of Arizona. *Colorado River Indian Tribes v. Town of Parker*, No. CIV 83-2359-PHX-RGS. *See also Colorado River Indian Tribes v. Town of Parker*, 776 F.2d 846 (9th Cir. 1985) (interlocutory appeal by Tribes of preliminary injunction relating to tribal ordinance regulating liquor).[1] One of the primary issues in the litigation is whether all or a portion of the townsite has been disestablished from the Colorado River Indian Reservation. District Court Docket Nos. 87, 109, 144, 156; 776 F.2d at 848. Unless it is determined that the fee-patented lands in the townsite have been disestablished from the reservation, questions will naturally arise regarding the nature and extent of municipal and tribal regulatory authority over those lands. Thus, this Court's decision in the cases now before it could have a substantial impact upon the Town of Parker.

PARTIES SUPPORTED

Amicus curiae Town of Parker supports the position taken by petitioners in this Court that the decision of the Ninth Circuit Court of Appeals relating to the "open area" involved in *Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside*, 828 F.2d 529 (9th Cir. 1987), should be reversed.

SUMMARY OF ARGUMENT

As its primary position, this amicus curiae urges the Court to hold that Indian tribes lack civil regulatory authority over fee patented

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[1]Because the Town of Parker is a political subdivision of the State of Arizona and this brief is sponsored by the authorized law officer of the town, consent to the filing of this brief was neither sought nor required under Rule 36, Rules of the Supreme Court of the United States.

lands located within the geographic boundaries of an Indian reservation unless activities on those lands so significantly impair the use and enjoyment of the trust lands that they threaten to defeat the entire purpose of the reservation. The second section of this amicus brief explains that regardless of the outcome of the pending cases, fee lots in the Town of Parker should not be subject to tribal regulatory jurisdiction.

ARGUMENT

I.

THE DECISION OF THE NINTH CIRCUIT SHOULD BE REVERSED.

The very limited nature of tribal authority over nonmembers was emphasized by this Court in *Montana v. United States*, 450 U.S. 544 (1981). Because "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes," it "cannot survive without express congressional delegation." *Id.* at 564. As a general proposition, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* at 565.

In *Montana* the Court recognized two narrow exceptions to the general absence of tribal regulatory authority over nonmembers on an Indian reservation. First, a tribe retains the authority to regulate "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565. Implicit in this first exception is a recognition that it is generally appropriate for the level of tribal civil jurisdiction over lessees, licensees and their invitees to be a matter of private contract between the parties. If a tribe's demands are unacceptable, a nonmember can avoid tribal jurisdiction

by the simple expedient of foregoing the consensual relationship and staying off the reservation.[2]

According to the second exception recognized in *Montana*:

> A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

450 U.S. at 566 (the "tribal interest" test). Reasoning that zoning is an appropriate exercise of the police power because "it is designed to promote the health and welfare of its citizens," the Ninth Circuit concluded in the cases now before this Court that tribes are entitled to regulate fee land owned by non-Indians. 828 F.2d at 534-35. Under the Ninth Circuit's interpretation of *Montana*, tribes presumably have authority to subject fee lands to the full panoply of police powers, from business regulation to eminent domain to health and safety ordinances, subject only to a determination in a particular case that a tribe's interests in imposing its own laws on fee lands are outweighed by a local government's interests. *See* 828 F.2d at 535-36.

By recognizing a broad tribal authority to exercise "police powers" on fee lands within Indian reservations, the Ninth Circuit has expanded tribal jurisdiction so far beyond the boundaries established by this Court in *Montana* that the exceptions supplant the general rule. The very narrow scope of the "tribal interest" exception intended by *Montana* is confirmed by the manner in which it was applied in that case. First, the Court noted the absence of evidence suggesting that non-Indian hunting and fishing on fee lands "so threaten the Tribe's political or economic security as to justify tribal regulation." 450 U.S. at 566. No one alleged that non-Indian hunting and fishing on fee lands "imperil the subsistence or welfare of the

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[2]In the cases before this Court, the district court recognized that the "consensual relationship" exception is not applicable to tribal regulation of fee land. *See* 617 F.Supp. at 743, 757. The Ninth Circuit's opinion did not address that issue.

Tribe." *Id.* The State of Montana's statutory and regulatory scheme did not "prevent the Crow Tribe from limiting or forbidding non-Indian hunting and fishing" on reservation trust lands. *Id.* at 566-67.

An examination of the cases cited in *Montana* as support for the "tribal interest" test also reveals the very limited circumstances in which the exception applies. *Fisher v. District Court*, 424 U.S. 382 (1976), held that because state court jurisdiction over an adoption proceeding involving only tribal members "would interfere with the powers of [tribal] self-government," the tribal court had exclusive jurisdiction. *Id.* at 387. *Williams v. Lee*, 358 U.S. 217 (1959), rejected state court jurisdiction over a suit by a non-Indian licensee to collect for goods sold to tribal members on the reservation, describing the issue as being whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them. *Id.* at 220.[3]

The issue in *Thomas v. Gay*, 169 U.S. 264 (1898), and *Montana Catholic Missions v. Missoula County*, 200 U.S. 118 (1906), two other cases relied upon in *Montana*, was whether cattle owned by non-Indian residents of a reservation and permitted to graze on the reservation share the immunity from state taxation enjoyed by property of Indians. Despite an argument that the state tax violated the rights of the Indians because it reduced the amount of tribal revenue and the value of tribal lands, the Court upheld the state's interest in raising revenue from state residents.

In an important footnote, the Court stated in *Montana* that as a corollary to the "tribal interest" test, the Court has held that "Indian tribes retain rights to river waters necessary to make their reservations livable." 450 U.S. at 566 n.15 (citing *Arizona v. California*, 373 U.S. 546 (1963)). Ten years ago this Court reiterated that there is an implied reservation of water only if "without the water the purposes

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[3]The state had no interest in asserting jurisdiction over the transaction, which involved no off-reservation activities.

of the reservation would be entirely defeated." *United States v. New Mexico*, 438 U.S. 696, 700 (1978).

These cases indicate that the proper interpretation of the "tribal interest" test of *Montana* is that Indian tribes retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within reservation boundaries only if the conduct so significantly impairs the use and enjoyment of the trust lands that it threatens to defeat the entire purpose of the reservation. This interpretation of the "tribal interest" test implements the general principle that Indian tribes lack sovereign power over the activities of nonmembers except to the extent "necessary to protect tribal self-government or to control internal relations . . . ." 450 U.S. at 564. At the same time, this approach ameliorates two serious consequences of the Ninth Circuit's decision in the pending cases: frequent litigation and regulation without representation or remedy.

If allowed to stand, the Ninth Circuit's interpretation of *Montana* would foster a virtually unlimited series of lawsuits between Indian tribes, local governments and owners of fee lands on reservations in western states regarding the proper outcome of the balancing process. The human imagination is essentially the only limitation on the variety of instances in which the scope of respective rights could be questioned and litigated. By properly limiting tribal regulation of fee lands to instances where it is necessary to prevent fundamental adverse effects that threaten the purpose of a reservation, this Court would give lower courts and potential litigants a clear signal that in most instances tribes lack authority to regulate fee lands.

The Ninth Circuit's unwarranted expansion of *Montana* also promotes regulation without representation or remedy. Nonmembers cannot vote in tribal elections or serve on tribal councils. Thus, they have no voice in the decisions made by tribal regulators. Moreover, tribal governments are not bound by the limitations imposed by the Bill of Rights or the Fourteenth Amendment, *Talton v. Mayes*, 163 U.S. 376 (1896), and, with the exception of writs of habeas corpus in criminal cases, are immune from suit for violations of the Indian Civil

Rights Act, 25 U.S.C. §§ 1301-1303. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Under these circumstances, tribal regulation of fee owners should be carefully limited to situations where it is necessary to protect the purpose for which a reservation was created.

Applied to the facts of the pending cases, the "defeated purpose" test would uphold the decisions of the district court. In *Yakima Indian Nation v. Whiteside*, 617 F.Supp. 735 (E.D. Wash. 1985), the district court found that the proposed housing development "places critical assets of the Closed Area in jeopardy" and is a "danger to the economically important timber production," 617 F.Supp. at 744, from which ninety percent of the annual tribal income is derived. *Id.* at 742. In the companion case, however, the district court found that the proposed project in the "open area" "does not threaten a food source" of tribal members or "the economic security of the Yakima Nation," and it will not significantly infringe uses of lands having "unique religious or spiritual significance" to tribal members. *Yakima Indian Nation v. Whiteside*, 617 F.Supp. 750, 755 (E.D. Wash. 1985).

II.

REGARDLESS OF THE OUTCOME OF THE PENDING CASES, FEE LOTS IN THE TOWN OF PARKER SHOULD NOT BE SUBJECT TO TRIBAL REGULATORY JURISDICTION.

Even if this Court decides to affirm the judgment of the Ninth Circuit, we contend that the situation involving this amicus curiae is sufficiently different than the cases now before the Court that, regardless of the outcome in those cases, fee lots in the Town of Parker should not be subject to tribal regulatory jurisdiction. In the first place, the pending cases do not involve the question of tribal zoning authority in incorporated municipalities; the Ninth Circuit expressly noted that apparently "neither Yakima Nation nor the County regulates land use within the incorporated towns." 828 F.2d at 531. In addition, the Parker townsite was created with the understanding and intention that it would not be subject to tribal

jurisdiction. Non-Indian settlers purchased lots in the townsite and established homes and businesses in reliance upon that expectation. For more than seventy years, county and municipal governments exercised exclusive jurisdiction over the lots in town without any interference from the tribes. Accordingly, we urge the Court to utilize particular care in describing the nature and scope of tribal authority over fee lands located within Indian reservations.

The following summary of facts relating to this amicus curiae is derived from the hundreds of documents, report of expert witness Lawrence C. Kelly, and other materials filed in federal district court in December 1987 as part of the Town of Parker's opposition to a motion for summary judgment filed by the Colorado River Indian Tribes. The court has not yet issued its decision.[4]

The land which now comprises the Parker townsite was added to the Colorado River Indian Reservation by an executive order in 1874. Following the passage of the General Allotment Act, 24 Stat. 388, in 1887 and the Reclamation Act, 32 Stat. 388, in 1902, potentially irrigable reservation lands along the Colorado River became the target of developers and other non-Indians. Prompted by these factors and the destitute condition of the Indians living on the reservation, Congress enacted legislation in 1904 authorizing allotment of small parcels of reservation lands to individual Indians and sale of the remainder to non-Indian settlers under the provisions of the Reclamation Act. 33 Stat. 224.

Meanwhile, the Arizona and California Railroad decided to ford the Colorado River near the location where Parker is now situated. The railroad lobbied for creation of a town where railroad employees could establish residences without trespassing on the reservation and

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[4]As stated previously, one of the primary issues in the litigation is whether all or a portion of the Parker townsite was disestablished from the Colorado River Indian Reservation. If the fee lands in town are determined to be part of the reservation, much of the evidence relating to the disestablishment issue would be relevant in determining the scope of any tribal authority over those fee lands.

without securing a residence permit — *i.e.*, without being subject to tribal jurisdiction. Congress acted in 1908, appropriating money to enable the Secretary of the Interior to reserve and set apart lands for townsite purposes, and to survey, plat and sell the tracts. 35 Stat. 77. The federal government subsequently established a townsite of approximately one square mile in the northern portion of the reservation. The report of expert witness Lawrence Kelly concludes that the Parker townsite was established at the urging of non-Indians for the use of non-Indians, with the federal government expressly recognizing that the Parker townsite land was not needed by any Indians. The federal government also stated that the townsite lands would be "in the hands of white people," and determined that residence permits and traders' licenses were no longer required in relation to Parker townsite lands.

The federal government began selling Parker lots in 1910, issuing fee patents to the purchasers. Approximately two-thirds of the lots in Parker are now privately owned, while the remainder are owned by the United States. No additional sales have been permitted since approximately 1930. As of 1980 nearly ninety percent of the 2,542 inhabitants of the town were non-Indians. Similarly, more than ninety percent of the occupied housing units are occupied by non-Indians.

For approximately seventy years, county and municipal governments exercised exclusive jurisdiction over all of the lots in the town without any interference from the tribes. The tribes, themselves, expressly and repeatedly disclaimed jurisdiction over activities in the townsite during that period of time. The federal government also expressly recognized the exclusive civil jurisdiction of county and municipal governments in the Parker townsite. Beginning in 1910, for example, the federal government repeatedly advised applicants for franchises for the installation of the water system, water and lighting system and electric light and power and gas system, all in the townsite of Parker, that the United States no longer had jurisdiction or control over such matters, that the townsite had been dedicated to the public, that the town would have control over such matters when

it was incorporated, and that until such time, control would be with the county authorities under Arizona law. As in *Montana,* the tribes have "traditionally accommodated" themselves to "'near exclusive' regulation" of activities within the townsite. 450 U.S. at 566.

The longstanding exercise of exclusive jurisdiction in Parker by the county and municipal governments offers strong evidence that even if Parker has not been disestablished from the Indian reservation, activities on fee lands in the townsite do not threaten or significantly affect "the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566. Just as the Crow Tribe lacks authority under *Montana* to regulate non-Indian hunting and fishing on fee lands within its reservation, the Colorado River Indian Tribes' "inherent sovereignty" would not entitle them to apply their zoning ordinance, building code or other forms of civil jurisdiction to fee lands in the Parker townsite.

CONCLUSION

If the Ninth Circuit's interpretation of *Montana* is not rejected, non-Indian owners of fee lands in reservations will be subject to extensive regulation by a government in which they have no voice and which is immune from suit for violations of most of the basic constitutional protections. Rather than permitting the narrow *Montana* exceptions to tribal jurisdiction over fee lands to swallow the general rule prohibiting tribal regulation, we urge the Court to reverse the Ninth Circuit to firmly make clear that tribal regulation of fee lands is limited to the rare instances when it is necessary to prevent fundamental adverse effects that threaten the purpose of a reservation. In addition, regardless of how *Montana* is clarified and

applied in the pending cases, fee lots in the Town of Parker should not be subject to tribal regulatory jurisdiction.

Respectfully submitted,

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